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No. 92-190

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The McCarran Amendment allows joinder of the United States as a defendant in comprehensive water right adjudication suits, but specifically provides that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). The question presented is:

Whether, when a State joins the United States as a defendant in such a suit, the State may refuse to recognize the United States' water right claims unless the United States pays "filing fees" to finance the State's costs in the adjudication.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Idaho Power Company, Twin Falls Canal Company, and North Side Canal Company participated as respondents in the Idaho Supreme Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
Summary of argument	13
Argument:	
The United States is immune from the State of Idaho's requirement that water right claimants pay "filing fees" to finance the State's costs in a water right adjudication	15
A. Under well settled principles, the State must demonstrate that the McCarran Amendment contains a clear and unambiguous waiver of the United States' sovereign immunity from filing fees	15
B. The McCarran Amendment does not waive the United States' sovereign immunity from assessment of filing fees in general water right adjudications	18
Conclusion	39

TABLE OF AUTHORITIES

Cases:

Ardestani v. *INS*, 112 S. Ct. 515 (1991)	16
Avondale Irrig. Dist. v. *North Idaho Properties, Inc.*, 523 P.2d 818 (Idaho 1974)	36
Block v. *North Dakota*, 461 U.S. 273 (1983)	16
Cappaert v. *United States*, 426 U.S. 128 (1976)	28
EPA v. *California*, 426 U.S. 200 (1976)	15-16
Hancock v. *Train*, 426 U.S. 167 (1976)	15, 23, 30
Idaho Power Co. v. *State*, 661 P.2d 741 (Idaho 1983)	6
Irwin v. *Veterans Admin.*, 111 S. Ct. 453 (1990)	15

Cases—Continued: Page

Library of Congress v. *Shaw*, 478 U.S. 310 (1986) 14, 15, 16, 17, 21, 30, 32, 38
Loeffler v. *Frank*, 486 U.S. 549 (1988) 15
McDonald v. *United States*, 279 U.S. 12 (1929) 26
Missouri Pac. R.R. v. *Ault*, 256 U.S. 554 (1921) 17
Newton v. *Consolidated Gas Co.*, 259 U.S. 101 (1922) 34
Peterson, Ex parte, 253 U.S. 300 (1920) 34
Ruckelshaus v. *Sierra Club*, 463 U.S. 680 (1983) 22
Snake River Basin Water System, In re, 764 P.2d 78 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989) 6, 10
The Antelope, 25 U.S. (12 Wheat.) 546 (1827) 21
United Sav. Ass'n v. *Timbers of Inwood Forest Associates*, 484 U.S. 365 (1988) 27
United States v. *Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984) 28
United States v. *Chemical Foundation, Inc.*, 272 U.S. 1 (1926) 21
United States v. *District Court for the County of Eagle*, 401 U.S. 520 (1971) 25, 26, 28
United States v. *King*, 395 U.S. 1 (1969) 15, 16
United States v. *Menasche*, 348 U.S. 528 (1955) 24
United States v. *Mitchell*:
445 U.S. 535 (1980) 16
463 U.S. 206 (1983) 15
United States v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992) 13, 15, 16, 17, 19, 24, 29, 30, 32
United States v. *Sherwood*, 312 U.S. 584 (1941) 15
United States v. *Superior Court*, 697 P.2d 658 (Ariz. 1985) 36
United States Dep't of Energy v. *Ohio*, 112 S. Ct. 1627 (1992) 14, 16, 17, 22, 27, 30, 32
Winters v. *United States*, 207 U.S. 564 (1908) 28

Statutes and rules:

Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308 22
Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
11 U.S.C. 101(4)(A) 29

Statutes and rules—Continued: Page

11 U.S.C. 106 29
11 U.S.C. 106(a) 29
11 U.S.C. 106(b) 29
11 U.S.C. 106(c) 17, 29
Civil Rights Act of 1964, § 706(k), 42 U.S.C. 2000e-5(k) 30
Equal Access to Justice Act:
28 U.S.C. 2412 22
28 U.S.C. 2412(a) 22, 34
28 U.S.C. 2412(d)(1)(A) 23
28 U.S.C. 2412(d)(2)(B) 23
McCarran Amendment, 43 U.S.C. 666 ..... *passim*
43 U.S.C. 666(a) ..... *passim*
Resource Conservation and Recovery Act, 42 U.S.C. 6961 16
28 U.S.C. 519 34
28 U.S.C. 1913 note 21
28 U.S.C. 1914(a) 21
28 U.S.C. 1914(a) (1952) 21
28 U.S.C. 1914 note 21
28 U.S.C. 1920 ..... 22, 33, 34, 36
28 U.S.C. 1921 36
28 U.S.C. 1930 note 21
42 U.S.C. 1988 33
Ariz. Code (1939):
§ 75-114 31
§ 75-137 31
1943 Cal. Stat.:
pp. 1631-1632 (Cal. Water Code §§ 2040-2043) 6
p. 1641 (Cal. Water Code § 2850) 31
Colo. Rev. Stat. § 147-9-19(4) (1953) 31
Idaho Code:
§ 42-221 (1977) 8
§ 42-1401 (1948) 5, 6, 37
§ 42-1401A(7) (1990) 35
§ 42-1406 (1990) 35
§ 42-1406A (1990) 35

Statutes and rules—Continued:	Page
§ 42-1406A(1) (1990)	6
§ 42-1408A (1990)	7
§§ 42-1408A to 42-1410 (1990)	10
§ 42-1409 (1990)	7
§§ 42-1409 to 42-1411 (1990)	35
§ 42-1410 (1990)	7
§ 42-1411 (1990)	7
§ 42-1412 (1990)	7, 35
§ 42-1412(4) (1990)	35
§ 42-1414 (1990)	2, 3, 8, 9, 33
§ 42-1414(3) (1990)	8
§ 42-1418 (1990)	35
§ 42-1422 (1990)	35
§ 42-1777(1) (1990)	8
§ 42-1777(2) (1990)	8
Nev. Comp. Laws (Bender-Moss 1929):	
§ 7905	31
§ 7914	31
§ 7930	6, 31
N.M. Stat. § 77-406 (1941)	6
N.D. Rev. Code § 61-0317 (1943)	6
Okla. Stat. § 82-13 (West 1951)	6
Or. Comp. Laws Ann. (1940):	
§ 116-801	31
§ 116-807	31
§ 116-822	6, 31
Utah Code Ann. § 100-4-20 (1943)	6
Wash. Rev. Stat. § 7371 (Remington 1932)	6, 31
Fed. R. Civ. P.:	
Rule 53(a)	34
Rule 54(d)	22
Miscellaneous:	
S. Rep. No. 755, 82d Cong., 1st Sess. (1951)	20
2A N. Singer, *Sutherland Statutory Construction* (5th ed. 1992)	26
39 Comp. Gen. 133 (1959)	34
48 Comp. Gen. 681 (1969)	34
52 Comp. Gen. 621 (1973)	34

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Idaho Supreme Court (Pet. App. 1a-40a) is reported at 832 P.2d 289. The judgment of the district court (Pet. App. 41a-44a) and the memorandum decisions of the district court (Pet. App. 45a-80a, 81a-89a, 90a-115a) are unreported.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on March 30, 1992. On June 22, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 28, 1992, and the petition was filed on that date. This Court granted the petition for a writ of certiorari on October 19, 1992. The jurisdiction of this Court rests upon 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

The McCarran Amendment provides in relevant part:

> § 666. Suits for adjudication of water rights
>
> (a) Joinder of United States as defendant; costs
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. 666(a).

Section 42-1414 of the Idaho Code provides in relevant part:

> § 42-1414. Fees for filing notice of claim.—In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights the department of water resources shall accept no notice of claim * * *

> unless such notice of claim is submitted with a filing fee based upon the fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. * * *
>
> (1) Flat fee per claim filed:
>
> (a) Claims for domestic and/or stockwatering rights $25.00
>
> (b) Claims for all other rights $50.00
>
> (2) Additional variable water use fee for claims filed based upon acreage, power generating capacity, c.f.s., or equivalent volume of water:
>
> (a) Irrigation use (one fee irrespective of number of claims: .....$1.00 per-acre
>
> (b) Power: .....$3.50 per kilowatt of capacity (manufacturer's nameplate rating)
>
> (c) Aquaculture: .....$10.00 per c.f.s.
>
> (d) Municipal, industrial, commercial, mining, heating, cooling: .....$100.00 per c.f.s.
>
> (e) Public instream flow, public lake level maintenance, wildlife: .....$100.00 per c.f.s.
>
> (3) * * * All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established in section 42-1777, Idaho Code.

Idaho Code § 42-1414 (1990).

STATEMENT

The McCarran Amendment allows a State to join the United States as a defendant in a suit for adjudication of rights to the use of water of a river system

or other source, but bars entry of any "judgment for costs" against the United States in such a suit. 43 U.S.C. 666(a). This case arises from the State of Idaho's joinder of the United States as a defendant, pursuant to the McCarran Amendment, in a suit for the comprehensive adjudication of water rights in the Snake River basin. The United States seeks reversal of a decision of the Idaho Supreme Court affirming a state district court's determination that Idaho may refuse to adjudicate the United States' water right claims unless the United States pays "filing fees" to finance the State's costs in the adjudication.

1. Congress enacted the McCarran Amendment to facilitate the comprehensive judicial determination of rights to the use of water of a river system or other source. Enacted in 1952, the McCarran Amendment contains three principal provisions respecting the United States' waiver of sovereign immunity. First, the Amendment provides that the United States may be joined as a defendant in any suit

> (1) for the adjudication of rights to the use of water of a river system or other source, or
>
> (2) for the administration of such rights,

where

> it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. 666(a). Second, the McCarran Amendment limits the United States' assertion of sovereignty as a defense on the merits, stating that when the

United States has been properly joined in the circumstances described above, the United States shall

> be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty.

43 U.S.C. 666(a). Third, the McCarran Amendment states that the United States "shall be subject to the judgments, orders, and decrees of the court having jurisdiction" to the same extent "as a private individual under like circumstances:"

> *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. 666(a).

At the time Congress enacted the McCarran Amendment, Idaho used judgments for costs to finance the State's expenses in general water right adjudications. See Idaho Code § 42-1401 (1948) (Idaho Exh. 247). Idaho's Department of Reclamation would make an examination of the water system and submit an itemized, verified statement of its expenses to the state auditor, who would present the statement to the state board of examiners. Expenses approved by the board would be paid out of general revenues. The state auditor would then certify those amounts to the court for inclusion as "part of the costs and disbursements in said cause." Idaho Code § 42-1401 (1948) (Idaho Exh. 247). At the time of entry of final judgment, the court would

> adjudge and determine the proportionate amount of such cost of examination and survey to be paid by each of the parties to said suit * * *.

Idaho Code § 42-1401 (1948) (Idaho Exh. 247). The McCarran Amendment's "costs proviso" expressly retained the United States' immunity from assessment under that financing mechanism.[1]

2. For many years, the State of Idaho and the Idaho Power Company have been engaged in a dispute over utilization of water from the Snake River. See *Idaho Power Co.* v. *State*, 661 P.2d 741 (Idaho 1983). To resolve that longstanding dispute, the State of Idaho and the Idaho Power Company agreed to propose and support legislation authorizing a general adjudication of water rights in the Snake River basin. In 1985 and 1986, the Idaho Legislature enacted the proposed legislation, which provides that "the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran amendment." Idaho Code § 42-1406A(1) (1990). See generally *In re Snake River Basin Water System*, 764 P.2d 78, 80-81 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989).

In addition to requiring the Director to petition the district court to commence the adjudication, the

[1] The McCarran Amendment had the same effect in other western States, including Senator McCarran's own State of Nevada, which also used judgments for costs to recoup the State's expenses in conducting general water right adjudications. See 1943 Cal. Stat. 1631-1632 (Cal. Water Code §§ 2040-2043) (Idaho Exh. 245); Nev. Comp. Laws § 7930 (Bender-Moss 1929) (Idaho Exhs. 252-256); N.M. Stat. § 77-406 (1941) (Idaho Exhs. 257-258); N.D. Rev. Code § 61-0317 (1943) (Idaho Exh. 259); Okla. Stat. § 82-13 (West 1951) (Idaho Exh. 260); Or. Comp. Laws Ann. § 116-822 (1940) (Idaho Exhs. 261-262); Utah Code Ann. § 100-4-20 (1943) (Idaho Exh. 265a-b); Wash. Rev. Stat. § 7371 (Remington 1932) (Idaho Exhs. 266-267).

revised Idaho adjudication code specifies other responsibilities to be performed by the Director. Those responsibilities, which are essentially the same as those performed by the Director before the statute was amended, see Tr. 612-618, include: (1) service of notice of the court's order commencing the adjudication, including a form prepared by the Director for claimants to file for each claimed water right, Idaho Code §§ 42-1408A, 42-1409 (1990); (2) examination of both the water system and water right claims, as well as preparation of maps of the water system, which shall be available "for the purpose of assisting any claimant in preparing and filing claims and objections to the director's report," *id.* § 42-1410; and (3) preparation of a "report on the water system," containing (a) the Director's determination with respect to all claimed water rights acquired under state law, (b) an abstract of the notices of claim and negotiated agreements for federal reserved water rights, and (c) the notices of claim and negotiated agreements, *id.* § 42-1411. Any party may file an objection to the Director's report, and the Director has the further responsibility of responding to any objection filed. *Id.* § 42-1412. The Director's report, any objections, the responses to objections, and the notices of claim and negotiated agreements "shall constitute the pleadings" before the district court. *Ibid.* In addition to performing the statutory duties established by the state legislation, the Director purports also to provide assistance at no charge to claimants who request help in filing a notice of claim form, see Tr. 1178-1179, and provides access to the State's computer database at an additional charge to a claimant, see Tr. 1184-1185.

The 1985 and 1986 amendments to Idaho's adjudication code also altered the State's methods for financing its costs in water right adjudications. Specifically, they state that the Director of Idaho's Department of Water Resources shall not accept a "notice of claim" from any water right claimant unless the notice is accompanied by a filing fee in accordance with a fee schedule set out in the statute. Idaho Code § 42-1414 (1990). "Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant." *Ibid.*[2]

The monies collected as filing fees are "placed in the water resources adjudication account established in section 42-1777." Idaho Code § 42-1414(3) (1990). The Idaho Legislature annually appropriates the filing fees placed in that account "to pay the costs of the [Department of Water Resources] attributable to general water rights adjudications" and "to pay for judicial expenses directly relating to the Snake river adjudication." *Id.* § 42-1777(1) and (2). Idaho uses the funds placed in the adjudication account to pay not only the State's costs of processing, filing, and reporting on water right claims, see,

[2] Idaho first imposed filing fees in 1971, but the fees imposed between 1971 and 1985 were nominal in amount. A claimant paid a fixed fee of $10 if the claim was evidenced by a prior decree, permit or license, or paid a fee equal to the fee charged for obtaining a permit if the right claimed was created solely by the application of water to beneficial use. See Idaho Code § 42-221 (1977). The revised filing fee provision at issue here both changed the manner of financing the State's adjudication costs and substantially increased the charges assessed against claimants.

e.g., R. 414-415, 421-423, but also various litigation costs that the State incurs in challenging such claims, including attorney salaries and expenses for investigations, evidentiary development, witnesses, and service of process. See, *e.g.*, U.S. Exh. 3006, at 2-10, 51-55; R. 423-424; Tr. 376, 378-381, 547-553, 595. The State has projected that it will charge $2.1 million in attorney salaries alone to the adjudication account. See Tr. 417, 545, 546.

Although the Idaho statute describes the fee structure as providing an "equitable cost-sharing formula for financing the costs of adjudicating water rights," Idaho Code § 42-1414 (1990), the variable filing fees fall more heavily upon sovereign claimants, such as the United States and Indian Tribes, that are entitled to file notices of claims to instream flows.[3] The United States has estimated that the Idaho statute would require that federal agencies pay more than $10 million in fees in the Snake River Basin adjudication, and the bulk of those fees would be required for federal reserved water right claims, as distinguished from claims to water rights acquired under state law. See, *e.g.*, R. 246-262, 265-266, 271-287.

3. On June 17, 1987, the Director of the Idaho Department of Water Resources filed a petition in the District Court of the Fifth Judicial District nam-

[3] Agricultural users pay the lowest variable fee—one dollar per acre irrigated, regardless of the amount of water diverted or consumed. Hydropower users are assessed a comparatively low fee of $3.50 per kilowatt of capacity, while entities claiming water for aquaculture are charged $10 per cfs (cubic foot per second). Entities claiming water for municipal, industrial, or commercial use and public entities seeking to maintain minimum instream flows are charged ten times that amount: $100 per cfs. See Idaho Code § 42-1414 (1990).

ing the United States and all other water users in the Snake River basin as defendants. The district court formally commenced the adjudication by order dated November 19, 1987, see *In re Snake River Basin Water System*, *supra* (affirming the commencement order), and the Director has received notices of water right claims in accordance with Idaho law. See Idaho Code §§ 42-1408A to 42-1410 (1990). The district court established a schedule under which the United States' claims are filed on an agency-by-agency basis through March 1993.

The United States has attempted to submit its notices of claims according to the court's schedule, but the Director has refused to file any notices not accompanied by filing fees. See Tr. 1180. On June 30, 1989, the United States filed a petition for a writ of mandamus to compel the Director to accept the United States' notices without filing fees. The petition asserted, *inter alia*, that the Director is under a duty to file the notices without accompanying filing fees because the McCarran Amendment does not waive the United States' immunity from assessment of fees in general water right adjudications. The district court entered a judgment denying the petition for a writ of mandamus after issuing a series of memorandum decisions rejecting the United States' specific contentions. Pet. App. 41a-44a, 45a-80a, 81a-89a, 90a-115a.

The district court's second decision specifically rejected the United States' argument that the McCarran Amendment does not waive federal sovereign immunity from payment of the State's filing fees. The court stated that "[t]he ordinary, contemporary and common meaning of the language of *McCarran* is that Congress waived *all rights* to assert any facet

of sovereign immunity in a general [water right] adjudication * * * which is being conducted in accordance with state law." Pet. App. 86a (emphasis in original). The court concluded that the McCarran Amendment's "costs proviso" supported its result, reasoning that the Amendment "specifically exempts the United States from paying any 'judgment for costs,' " but contains "[n]o exception for filing fees." *Id.* at 88a.

4. The Idaho Supreme Court affirmed in a sharply divided decision. Pet. App. 1a-40a. The three-judge majority concluded that the McCarran Amendment contains a clear and unambiguous waiver of federal sovereign immunity from filing fees, stating that the "language selection" in the Amendment "clearly subjects the United States to all laws concerning an 'adjudication.' " *Id.* at 12a. The majority rejected constructions of the Amendment other than its own, stating that "[t]he employment of alternative statutory construction techniques is not required in analyzing 43 U.S.C. § 666(a) unless it is for the purpose of attempting to strain the plain statutory language to reach some pre-ordained result." *Ibid.*

The majority found no merit in the United States' contention that the McCarran Amendment's costs proviso demonstrates Congress's intent that the United States would not be subject to state filing fees. The majority concluded that the McCarran Amendment protects the United States only from a judgment for costs and that "[f]ees do not come within the term costs" because "costs are the charges that a party may recover from the opponent," while "fees are compensation paid to an officer, such as the court, for services rendered in the course of litigation." Pet. App. 14a. Additionally, the majority

viewed the costs covered by the State's filing fees as not "actually 'costs' incurred by a party litigant," because "[t]he director is really a disinterested party" who acts in the adjudication in a position "analogous to the 'stakeholder' in an interpleader action." *Id.* at 15a. In the majority's view, "the United States is 'a water applicant' seeking affirmative relief from the state and not a 'defendant.'" *Id.* at 16a. Justice Bistline wrote a separate concurring opinion in which he largely rejected the doctrine of federal sovereign immunity, but also stated that he was "not persuaded of any error in [the majority's] analysis." *Id.* at 26a.

Justices Johnson and Boyle wrote separate dissents, concluding that the McCarran Amendment does not waive the United States' immunity from payment of filing fees. See Pet. App. 28a-29a, 29a-40a. Justice Johnson rejected the majority's distinction between filing fees and costs, observing that "[t]he 'filing fees' the state seeks to charge the United States are not the usual modest fees for filing pleadings in a lawsuit." *Id.* at 28a. Rather, the United States was being required "to fund involuntarily a significant part of the cost of the SRBA [Snake River Basin Adjudication]," because the adjudication itself was "occasioned" by the settlement of a dispute between the State and the Idaho Power Company and "[t]he United States is just along for the ride, pursuant to the McCarran Amendment." *Ibid.* Justice Johnson concluded:

> By the McCarran Amendment, the United States consented to joinder as a defendant in a "general adjudication." * * * The plain reading of the McCarran Amendment indicates that the United States did not waive its sovereign immunity to the payment of costs. * * * These "filing fees" are nothing more nor less than the State's costs for conducting the SRBA. By the McCarran Amendment, the United States waived its sovereign immunity only so far as being joined as a defendant, not so far as involuntarily paying the costs of the litigation.

Id. at 29a.

The other dissenter, Justice Boyle, objected that the majority's decision was inconsistent with "the Supreme Court's recent pronouncements" concerning waivers of sovereign immunity. Pet. App. 30a. He explained that a waiver of sovereign immunity "must be grounded exclusively upon the statutory text" and must be "unequivocal." *Ibid.* (citing *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992)). Because it is "at least 'plausible'" to construe the McCarran Amendment as retaining the United States' immunity from state filing fees, Pet. App. 38a, Justice Boyle concluded that the Amendment does not provide the requisite "unequivocal statutory waiver," *id.* at 40a.[4]

SUMMARY OF ARGUMENT

The Idaho Supreme Court erred in holding that the McCarran Amendment waives federal sovereign immunity from Idaho's requirement that water right claimants pay "filing fees" to finance the State's costs in the water right adjudication. This Court's decisions make plain that the United States retains

[4] After the state supreme court's decision, the district court issued an order requiring the Director to accept the United States' claims without payment of fees, pending final resolution of the controversy.

its sovereign immunity except to the extent that Congress has unambiguously waived it. Such a waiver must be stated in the statutory text in clear and unmistakable terms, particularly where the asserted waiver would subject the United States to monetary liability. See, *e.g.*, *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633, 1639-1640 (1992); *Library of Congress* v. *Shaw*, 478 U.S. 310, 314-315, 318-321 (1986). Although the McCarran Amendment unambiguously allows a State to join the United States as a defendant in comprehensive water right adjudication suits in state court, it does not allow the State, in addition, to exact payment from the United States for the cost of such suits.

None of the McCarran Amendment's provisions contains a waiver of federal sovereign immunity from filing fees in general water right adjudications. The first provision, which gives Congress's consent "to join the United States as a defendant," allows the State to sue the United States, but it does not grant the State any right to assess the United States with fees for the State's costs of adjudication. The second provision, which limits what defenses the United States has the "right to plead," is also unavailing. That provision waives the federal government's right to raise a legal defense of immunity from state law requirements when it asserts water rights derived under the State's water appropriation practices, but it is silent as to a State's right to exact fees from the United States as a condition precedent to asserting a legal claim. The third provision, which bars a State from imposing a "judgment for costs" against the United States, affirmatively demonstrates that Congress did not intend to permit the States to shift the costs of adjudications

from the States to the federal government. Indeed, this Court has repeatedly required that Congress provide a separate waiver to eliminate the United States' immunity for matters ancillary to the merits of a lawsuit, such as attorney's fees, interest, and costs. See *Library of Congress*, 478 U.S. at 314-315. The McCarran Amendment includes no such waiver of immunity from filing fees, regardless of whether they are denominated by the State as "fees" or "costs."

ARGUMENT

THE UNITED STATES IS IMMUNE FROM THE STATE OF IDAHO'S REQUIREMENT THAT WATER RIGHT CLAIMANTS PAY "FILING FEES" TO FINANCE THE STATE'S COSTS IN A WATER RIGHT ADJUDICATION

A. Under Well Settled Principles, The State Must Demonstrate That The McCarran Amendment Contains A Clear And Unambiguous Waiver Of The United States' Sovereign Immunity From Filing Fees

The Idaho Supreme Court correctly stated the "fundamental principle" that "the United States is immune from suit unless it consents to be sued." Pet. App. 6a. *E.g.*, *Loeffler* v. *Frank*, 486 U.S. 549, 554 (1988); *United States* v. *Mitchell*, 463 U.S 206, 212 (1983); *United States* v. *King*, 395 U.S. 1, 4 (1969); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Congress alone may consent to suit, and its consent—which constitutes a waiver of sovereign immunity—must be "unequivocally expressed." *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014 (1992); *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453, 457 (1990). The waiver must be "clear and unambiguous." See *Hancock* v. *Train*, 426 U.S. 167, 179 (1976); *EPA* v. *California*, 426 U.S. 200,

211 (1976). It cannot be implied, assumed, or based on speculation. *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992); *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *King*, 395 U.S. at 4.

Congress need not, of course, waive *in toto* the United States' immunity from suit; it may elect to provide only "a partial waiver of sovereign immunity." *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991). In those circumstances, the waiver "must be 'construed strictly in favor of the sovereign'" and not enlarged "beyond what the language requires." *Ohio*, 112 S. Ct. at 1633; *Nordic Village*, 112 S. Ct. at 1015; see also *Ardestani*, 112 S. Ct. at 520. For example, a congressional waiver of federal sovereign immunity does not subject the United States to *monetary* liability—particularly liability for fees and costs associated with the adjudication itself—unless that consequence is specifically set out in the statutory text. See *Ohio*, *supra*; *Nordic Village*, *supra*; *Library of Congress*, *supra*.

In *Ohio*, the Court concluded that a provision of the Resource Conservation and Recovery Act (RCRA) that subjects the United States to "all Federal, State, interstate, and local requirements, both substantive and procedural[,] * * * in the same manner, and to the same extent, as any person is subject to such requirements," 42 U.S.C. 6961, is not "an explicit and unambiguous waiver of federal sovereign immunity from punitive fines." *Ohio*, 112 S. Ct. at 1639. The Court explained:

> We * * * agree with the Tenth Circuit that "all . . . requirements" "can reasonably be interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures." *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1295 (CA10 1990).

Id. at 1639-1640.

Similarly, in *Nordic Village*, the Court rejected a claim that Congress had waived federal immunity from monetary liability in Section 106(c) of the Bankruptcy Code. 11 U.S.C. 106(c). The Court found that Section 106(c) could be "plausibl[y]" construed not to reach monetary liability, which "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *Nordic Village*, 112 S. Ct. at 1016. See also, *e.g.*, *Library of Congress*, 478 U.S. at 318-321 (federal statute subjecting United States to "costs the same as a private person" including "a reasonable attorney's fee as part of the costs" did not subject United States to payment of interest on attorney's fees); *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554, 563 (1921) (federal statute subjecting carriers under federal control to "all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law," did not subject federal carrier to monetary penalties authorized by state statute).

As Justice Boyle pointed out in dissent, although the Idaho Supreme Court purported to recognize those principles, its decision is flatly inconsistent with them. The court correctly identified the McCarran Amendment as the source of the United States' consent to suit in this case, but it failed to come to grips with the precise language of the statute and the limited scope of the waiver, which simply do not extend to monetary liability for fees and costs.

B. The McCarran Amendment Does Not Waive The United States' Sovereign Immunity From Assessment Of Filing Fees In General Water Right Adjudications

The McCarran Amendment affects the United States' sovereign immunity in three respects. The first provision of the Amendment (the "joinder provision") allows joinder of the United States as a defendant in suits for the comprehensive adjudication of water rights if it appears that the United States is the owner of or is in the process of acquiring water rights "by appropriation under State law, by purchase, by exchange, or otherwise." 43 U.S.C. 666(a). The second provision (the "pleading provision") states that "[t]he United States, when a party to any such suit, shall * * * be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty." 43 U.S.C. 666(a). The third provision (the "judgments provision") subjects the United States to judgments and orders of the court having jurisdiction, subject to the condition (the "costs proviso") that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). Those three provisions specifically curtail the United States' immunity in certain important respects, but they contain no express waiver of the United States' immunity from assessment of filing fees.

1. The Idaho Supreme Court mistakenly determined that a clear and unambiguous waiver of the United States' immunity from filing fees could be found in the McCarran Amendment's joinder provision, which allows a State "to join the United States as a defendant in any suit" for the general adjudication of water rights. 43 U.S.C. 666(a). The court

construed that language as a federal waiver of immunity from all state laws "necessary to carry out these types of suits." Pet. App. 11a. The State of Idaho, however, has disavowed that rationale. The State has acknowledged in this Court that the joinder provision by itself cannot suffice as a waiver of sovereign immunity from filing fees:

> Congress realized that merely consenting to joinder of the United States in an adjudication "suit" did not go far enough. * * * Further consent was needed from Congress, beyond simply joining the United States in such suits, to require the United States to comply with these special adjudication requirements. See, *e.g.*, *Blatchford* v. *Native Village of Noatak*, 111 S. Ct. 2578, at 2585 n.4 (1991).

Idaho Br. in Opp. 15.

We, of course, agree. The joinder provision allows the State to name the United States as a defendant in the suit and thereby subject the United States (upon receipt of legally adequate service) to the court's jurisdiction. But the joinder provision does not suffice as a complete waiver of immunity from all state laws that a state court might deem "necessary" to "carry out these types of suits." Pet. App. 11a. If that were so, Congress would have said so, and it would not have bothered to draft the McCarran Amendment in the precisely drawn terms contained in the joinder provision and the provisions that follow. See *Nordic Village*, 112 S. Ct. at 1015 (interpreting a waiver provision to "avoid[] eclipsing the carefully drawn limitations" contained in other provisions).

The McCarran Amendment's joinder provision serves an important but limited function. Prior to enactment of the McCarran Amendment, the United States could avoid joinder in a general adjudication of water rights by simply invoking its immunity from suit, and could stand aside while the relative rights of all other users on a river system were adjudicated. See S. Rep. No. 755, 82d Cong., 1st Sess. 5-6, 9 (1951). Under the McCarran Amendment's joinder provision, a plaintiff who satisfies the statutory criteria may now compel the United States to participate in the general adjudication suit.[5] But the mere fact that Congress has conditionally consented to joinder of the United States as a defendant on the merits does not mean that Congress has implicitly waived the United States' immunity to any state law—especially the filing fee requirement here—that a state court might determine is "necessary to carry out these types of suits." Pet. App. 11a.

The Idaho Supreme Court justified its expansive interpretation of the joinder provision on the rationale that "[t]o hold otherwise would allow the United States to plead immunity from those procedural rules * * * that the United States found inconvenient or objectionable." Pet. App. 11a. The United States, however, *should* be allowed to assert sovereign immunity from application of any procedural or other

[5] The plaintiff must show that (1) the suit is for the "adjudication of rights to the use of water of a river system or other source" or for the "administration of such rights"; (2) it appears that the United States is the owner of or is in the process of acquiring water rights "by appropriation under State law, by purchase, by exchange, or otherwise"; and (3) the United States "is a necessary party to such suit." 43 U.S.C. 666(a).

rules that fall outside the bounds of the congressional waiver. The fact that the United States may assert its sovereign immunity to "objectionable" procedural rules—state rules that trench upon important federal interests without the consent of Congress—does not justify the Idaho Supreme Court's wholesale obliteration of the sovereign immunity defense.

The Idaho Supreme Court's conclusion that the joinder provision subjects the United States to filing fees is especially implausible, because under traditional judicial practice, it is the plaintiff initiating the action—rather than the defendant—who pays a nominal filing fee for invoking the jurisdiction of the court.[6] Moreover, when the McCarran Amendment was enacted, the United States generally was immune from *any* method of cost-shifting in litigation, whether by entry of a judgment for costs or by otherwise requiring litigants to pay expenses, attorney's fees, or interest. See *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 20-21 (1926) (recognizing United States' "sovereign prerogative not to pay costs"); accord *The Antelope*, 25 U.S. (12 Wheat.) 546, 550 (1827).[7] No reason exists for believing that

[6] See, *e.g.*, 28 U.S.C. 1914(a) (requiring "the parties instituting any civil action * * * to pay a filing fee of $120"); see also 28 U.S.C. 1914(a) (1952) (requiring "the parties instituting any civil action * * * to pay a filing fee of $15"). Significantly, when the United States is a plaintiff in the federal courts, it does not pay filing fees. See 28 U.S.C. 1913 note (United States not subject to filing fees in courts of appeals); 28 U.S.C. 1914 note (United States not subject to filing fees in district courts); 28 U.S.C. 1930 note (United States not subject to filing fees in bankruptcy proceedings).

[7] See also, *e.g.*, *Library of Congress*, 478 U.S. at 314-317 (describing United States' traditional immunity from

Congress intended that the McCarran Amendment's joinder provision would implicitly authorize States to burden the federal treasury with extraordinary, multi-million dollar fee assessments like the ones Idaho seeks to impose here. To the contrary, in light of the settled principle that only an express waiver will suffice, if Congress had intended to waive the United States' longstanding immunity from costs and fees, it would have done so explicitly. See *Ohio*, 112 S. Ct. at 1633 (Congress is presumed to be aware of the "common rule" that "any waiver of the National Government's sovereign immunity must be unequivocal").[8]

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interest assessments); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983) ("Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees."); Fed. R. Civ. P. 54(d) ("costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law").

[8] For example, Congress has enacted a special statute, first in 1966 (Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308), and now embodied in the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, that grants federal courts strictly circumscribed power to assess the United States with court costs and attorney's fees in civil litigation. Idaho's filing fee requirement goes well beyond what Congress has allowed under EAJA. The Idaho statute assesses litigation expenses in excess of those permitted by EAJA, see 28 U.S.C. 2412(a) and 28 U.S.C. 1920, and requires payment at the *outset* of litigation, regardless of which party ultimately prevails. Moreover, the filing fees collected under the Idaho statute will be used in significant part to pay the litigation expenses of the State, which instituted this suit through its Director of the Department of Water Resources, and which, through the Director, may oppose any and perhaps all of the United States' claims. By contrast, in EAJA, Congress consented to payment of attorney's fees only to a prevailing party

Even if we assume that Congress implicitly intended to waive the United States' immunity as to any "necessary" state law, Idaho's filing fee assessments are in no sense "necessary" to carry out a water right adjudication. Pet. App. 11a. Idaho's fee assessment scheme is simply the State's most recently devised method for financing its expenses in water right adjudication suits, supplanting the State's prior system of paying its expenses through the use of general revenues or judgments for costs. See pp. 5-6, 8, *supra*. To be sure, the State must shoulder a greater financial burden in conducting general water right adjudications in the absence of revenues that the United States would provide through filing fee payments. But the mere fact that the State would prefer that the United States help finance the adjudication does not make filing fee assessments "necessary to carry out these types of suits." Pet. App. 11a. See *Hancock* v. *Train*, 426 U.S. at 199 (noting that Congress may limit its waiver of sovereign immunity in ways that leave in place obstacles to a State's desired method of administering a program).

2. The Idaho Supreme Court also erred in concluding that a clear waiver could be found in the McCarran Amendment's pleading provision, which states that when the United States is properly joined, it shall "be deemed to have waived any right to plead that the State laws are inapplicable." 43 U.S.C. 666(a). The Idaho court gave that provision the same

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(and only if the position of the United States was not substantially justified), see 28 U.S.C. 2412(d)(1)(A), and declined to render a State eligible for fees. See 28 U.S.C. 2412(d)(2)(B). Finally, Congress declined in EAJA to permit any assessment of fees and costs against the United States in state court.

interpretation that it gave to the joinder provision—*i.e.*, that it constitutes a federal waiver of immunity to the application of "all laws concerning an 'adjudication.'" Pet. App. 12a. Under the court's theory, a State may subject the United States to any requirement—monetary or otherwise—that relates to "a suit for adjudication or administration." *Ibid.*

The Idaho Supreme Court's interpretation pays no heed to the McCarran Amendment's language. The pleading provision explicitly provides that the United States shall be "deemed to have waived any right to plead that *the* State laws are inapplicable." 43 U.S.C. 666(a) (emphasis added). By placing the definite article "the" before "State laws," Congress made clear that the term "State laws" refers to a particular set of laws—namely, the body of state law identified in the immediately preceding sentence. As we have explained, the joinder provision subjects the United States to suit where, *inter alia*, it appears that the United States is the owner of, or is in the process of acquiring, water rights "by appropriation under State law." 43 U.S.C. 666(a). The "State law" referred to in the joinder provision and "the state laws" referred to in the pleading provision are one and the same: they are the body of substantive state laws governing "acqui[sition of] water rights by appropriation." 43 U.S.C. 666(a).

The Idaho Supreme Court's contrary construction violates "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *Nordic Village*, 112 S. Ct. at 1015. See *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955). Indeed, the Idaho court's interpretation makes the McCarran Amendment's joinder and

pleading provisions entirely redundant, because in its view, both serve as universal waivers of immunity from all state laws concerning an adjudication. Under our interpretation, by contrast, the joinder provision and the pleading provision each have a distinct meaning and operative effect. The joinder provision subjects the United States to participation as a defendant in a suit for the general adjudication of water rights if (among other things) it appears that the United States has acquired or is acquiring water rights by appropriation under state law. The pleading provision prevents the United States from relying on its "sovereignty" to excuse a failure by the federal government to adhere to substantive state law requirements for acquiring those rights. Both provisions are important, but neither prevents the United States from asserting its immunity from *other* state law requirements, including state statutes assessing fees and costs in litigating those rights.[9]

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[9] The State of Idaho unsuccessfully argued below that the qualifying phrase of the joinder provision—"where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit," 42 U.S.C. 666(a)—does not apply to the adjudication suits described in clause (1) of the sentence. Idaho contended that the qualifying phrase should instead apply only to its immediate antecedent, the administration suits described in clause (2). Justice Douglas's opinion for the Court in *United States* v. *District Court for the County of Eagle*, 401 U.S. 520 (1971), suggested such a reading, stating that the language following clause (2) "does not qualify § 666(a)(1), for (1) and (2) are separated by an 'or.'" 401 U.S. at 524. But that statement was merely dictum not essential to the Court's holding. See *ibid.* ("Yet even if 'or' be read as 'and,' we see no difficulty with Colo-

The Idaho court characterized our "statutory construction techniques" (Pet. App. 12a)—specifically our focus on the McCarran Amendment's use of parallel language in the joinder and pleading provisions—as an attempt to "strain the plain statutory language to reach some pre-ordained result." Pet. App. 12a. Our "statutory construction techniques,"

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rado's position."). The Idaho court wisely chose not to rely on that dictum. Justice Douglas stated no rule of grammar or statutory construction under which the use of "or" between two clauses necessarily bars application to the first clause of qualifying language that follows the second clause. He merely suggested that "or" has that effect but "and" would not. *Ibid.*

Indeed, Justice Douglas's dictum is inconsistent with the familiar rule that where (as here) a qualifying phrase is set off by itself with a comma, the comma indicates that the legislature intended that the qualifying phrase not be tied to the immediately preceding phrase, but instead should also qualify the other antecedents—here, clause (1)—as well. See 2A N. Singer, *Sutherland Statutory Construction* § 47.33, at 270 & n.5 (5th ed. 1992) ("Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."). Moreover, Justice Douglas' construction would create the absurd result that the United States may be joined as a defendant in a general adjudication suit—like this suit—even if it does *not* "appear[] that the United States is the owner of or is in the process of acquiring water rights" and even if the United States is *not* "a necessary party to such suit." 43 U.S.C. 666(a). See 2A N. Singer, *Sutherland Statutory Construction* § 47.33, at 270 ("Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent."); see also *McDonald* v. *United States*, 279 U.S. 12, 20-22 (1929).

however, are the same as those used by this Court. As the Court has explained:

> Statutory construction * * * is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear.

United Sav. Ass'n v. *Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988). Accord *Ohio*, 112 S. Ct. at 1641 ("It is axiomatic that a statute should be read as a whole."). In this instance, it is sensible to consider the McCarran Amendment's prior reference to "State law" in determining what Congress meant when it later used the term "the State laws." By contrast, the Idaho court's determination that the term refers to "all laws concerning an 'adjudication'" (Pet. App. 12a) finds no support in the Amendment. Indeed, the court's only justification for its construction is the court's recurrent (and circular) concern that if a different interpretation applied, the United States "would then be able to plead immunity and effectively control the adjudication." *Ibid.*

Our interpretation also makes the most sense when viewed in its broader context. The McCarran Amendment's joinder provision grants Congress's consent "to join the United States as a defendant" in a general stream adjudication suit. 43 U.S.C. 666(a). Nothing in that provision alone prevents the United States from asserting that it is immune from various state law obligations—such as beneficial use requirements—that a State may impose on citizens who acquire water rights through state doctrines of prior appropriation. It is the McCarran Amendment's pleading provision, which

precludes the United States from pleading that "the State laws are inapplicable," 43 U.S.C. 666(a), that prevents the United States from asserting a "sovereignty" defense to allegations of non-compliance with those requirements. The pleading provision spells out the scope of the congressional waiver of immunity insofar as the merits of the suit are concerned, making clear that the United States cannot rely on its sovereign status to excuse its failure to follow state law requirements in *acquiring water rights*, where the water rights are derived from state (as opposed to federal) law. But the pleading provision (like the joinder provision) does not waive the United States' immunity from other state laws, such as the filing fee assessments that Idaho seeks to impose in this case.[10]

The Idaho court sought support for its contrary result by drawing an analogy to this Court's decision

[10] This construction also explains why the McCarran Amendment allows adjudication of the United States' federal reserved water rights, but does not waive the United States' immunity from state laws that purport to restrict those rights. The McCarran Amendment's joinder provision applies whether the United States acquires water rights "by appropriation under State law" or "*otherwise*," 43 U.S.C. 666(a) (emphasis added), and therefore allows joinder of the United States to adjudicate both state appropriative rights and federal reserved rights. *County of Eagle*, 401 U.S. at 524. The McCarran Amendment's pleading provision, however, limits the United States' sovereignty defenses only with respect to "the State laws" governing acquisition of "water rights by appropriation." 43 U.S.C. 666(a). Thus, the McCarran Amendment preserves the rule that "determination of reserved water rights is not governed by state law." *Cappaert* v. *United States*, 426 U.S. 128, 145-146 (1976). See also *Winters* v. *United States*, 207 U.S. 564 (1908); *United States* v. *Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).

in *Nordic Village*, which concerned a congressional waiver of sovereign immunity in the Bankruptcy Code. See 11 U.S.C. 106. The court stated that "[t]he language of 43 U.S.C. § 666(a), just as plainly as the Bankruptcy Code did in 106(a) and (b), express [*sic*] a 'clear intent' of congress to subject the United States to all of the state court processes of an 'adjudication' of its water rights with the sole exception of costs." Pet. App. 12a. The Idaho court simply misread the *Nordic Village* decision, which powerfully supports our position.

In *Nordic Village*, this Court determined that a particular congressional waiver of federal sovereign immunity in the Bankruptcy Code, 11 U.S.C. 106(c), "fails to establish unambiguously that the waiver extends to monetary claims," because "[i]t is susceptible of at least two interpretations that do *not* authorize monetary relief." 112 S. Ct. at 1015. The Court contrasted the ambiguity of that provision with the "models of clarity" in two related provisions, 11 U.S.C. 106(a) and (b). The Court noted that those provisions specifically used the term "claim," which is defined within the Bankruptcy Code as a "right to payment" (11 U.S.C. 101(4)(A)). 112 S. Ct. at 1015. The McCarran Amendment clearly differs from Section 106(a) and (b) of the Bankruptcy Code, because it does not use terminology that necessarily expresses a waiver of immunity from monetary liability. Rather, like Section 106(c), the McCarran Amendment "fails to establish unambiguously that the waiver extends to monetary claims." 112 S. Ct. 1015. Indeed, the United States' claim of immunity is even more compelling here than in *Nordic Village*, because the United States has traditionally enjoyed a distinct im-

munity from fees and costs, for which a "separate waiver" is required. See *Library of Congress* v. *Shaw*, 478 U.S. at 314.[11]

In short, the Idaho Supreme Court failed to identify within the statutory text of the McCarran Amendment a "clear and unequivocal" waiver of immunity from filing fee assessments. See, *e.g.*, *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. at 1635; *Hancock* v. *Train*, 426 U.S. at 182, 198. And the court made no attempt to construe the McCarran Amendment "strictly in favor of the [federal] sovereign." *Nordic Village*, 112 S. Ct. at 1015. Instead, it impermissibly enlarged the McCarran Amendment's waiver "beyond what the language requires." *Library of Congress*, 478 U.S. at 318. See Pet. App. 38a (Boyle, J., dissenting).[12]

[11] In *Library of Congress*, the Court held that Congress had not expressly waived the United States' immunity from payment of interest on attorney's fees in suits under the Civil Rights Act of 1964, even though Section 706(k) of that Act provided that the United States was "liable for costs the same as a private person," including "a reasonable attorney's fee as part of the costs." 42 U.S.C. 2000e-5(k). The Court rejected the contention that Congress waived the government's immunity from interest "by equating the United States' liability to that of a private party," explaining that neither the statute nor its history refers to interest and that "[t]his congressional silence does not permit us to read the provision as the requisite waiver of the Government's immunity with respect to interest." 478 U.S. at 319. The Court further explained that "statutes placing the United States in the same position as a private party * * * have been read narrowly to preserve certain immunities that the United States has enjoyed historically." *Id.* at 319-320.

[12] The Idaho Supreme Court also justified its ruling on its understanding that, prior to enactment of the McCarran

3. Not only do the McCarran Amendment's joinder and pleading provisions express no congressional consent to imposition of filing fees against the United States, but also the Amendment's judgment provision —specifically its costs proviso—indicates quite plainly that no such consent was intended. The judg-

Amendment, "at least six [States] did charge a fee for filing a notice of claim." Pet. App. 13a. Even if that statement were correct, it would not establish that the McCarran Amendment waived the United States' immunity from filing fees, because the Amendment contains no clear and unambiguous waiver of federal sovereign immunity from filing fees. In any event, no State assessed comparable fees in judicial suits for the general adjudication of water rights—the only type of proceeding to which the McCarran Amendment applies. See 43 U.S.C. 666(a). Nevada, Oregon, and Arizona required payment of filing fees in water right adjudications initiated by administrative proceedings, but they did not require payment of filing fees in general adjudication suits. See Ariz. Code §§ 75-114, 75-137 (1939) (Idaho Exh. 243); Nev. Comp. Laws §§ 7905, 7914, 7930 (Bender-Moss 1929) (Idaho Exhs. 252-256); Or. Comp. Laws Ann. §§ 116-801, 116-807, 116-822 (1940) (Idaho Exhs. 261-262). The difference is important because the McCarran Amendment waiver extends only to judicial water right proceedings. See 43 U.S.C. 666(a) (allowing joinder of the United States "as a defendant in any suit" for the general adjudication of water rights). In the case of California, Colorado, and Washington, each of those States charged a nominal flat fee for filing a notice of claim. See 1943 Cal. Stat. 1641 (Cal. Water Code § 2850) ($5 per claim) (Idaho Exh. 245); Colo. Rev. Stat. § 147-9-19(4) (1953) ($5 per claim) (Idaho Exh. 246); Wash. Rev. Stat. § 7371 (Remington 1932) ($1 per claim) (Idaho Exh. 266). They did not charge anything like the extraordinary variable fees that Idaho seeks to assess in this case. Of course, in the absence of an express waiver, even nominal filing fees cannot be assessed against the United States, in either judicial *or* administrative proceedings.

ment provision states that the United States shall be subject to the "judgments, orders, and decrees of the court having jurisdiction" to the same extent as a private party, except that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). That provision makes clear that the United States retains its immunity from paying the State's (or any other party's) expenses in a suit for the general adjudication of water rights.

The Idaho Supreme Court concluded that the costs proviso does not affect Idaho's power to assess filing fees against the United States, because fees "are distinguishable from costs." Pet. App. 14a. The court's attempt to distinguish "fees" from "costs" misses the point. To assess filing fees against the United States, the State must demonstrate from the text of the McCarran Amendment that Congress "unequivocally" consented to those assessments. See pp. 15-17, *supra*. Congressional silence will not suffice. *Library of Congress*, 478 U.S. at 319. As we have explained, the McCarran Amendment contains no express waiver. The costs proviso shows that the Amendment is not merely silent on the question. Compare *Ohio*, *supra*; *Nordic Village*, *supra*. Instead, Congress took affirmative steps to protect the United States from state cost-shifting mechanisms. The costs proviso thus provides *additional* textual evidence—beyond the absence of an express waiver—that the United States retains its immunity from Idaho's filing fees.

In any event, Idaho's attempt to distinguish "fees" from "costs" is unpersuasive. The court reasoned that "[w]hile costs are the charges that a party may recover from the opponent, fees are those amounts

paid to the court." Pet. App. 14a. That distinction, however, exalts form over substance. A judgment for "costs" and Idaho's fee assessments are functionally equivalent: they both would require the United States to reimburse the State's litigation expenses. Indeed, the Idaho Code makes clear that the filing fees are assessed for the specific purpose of "financing the *costs* of adjudicating water rights." Idaho Code § 42-1414 (1990) (emphasis added).

Like a judgment for costs, Idaho's filing fee assessments are simply a mechanism for the State to recoup designated portions of its adjudication expenditures.[13] The fee assessments differ from a judgment for costs only in the *manner* by which the State exacts money from the federal treasury. That purely procedural difference does not overcome the clear import of the McCarran Amendment's costs proviso.

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[13] For example, the federal judicial code includes among the "costs" that may be taxed against a party:

> (1) Fees of the clerk and marshal;
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> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
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> (3) Fees and disbursements for printing and witnesses;
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> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
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> (5) Docket fees under section 1923 of this title;
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> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. 1920. See also, *e.g.*, 42 U.S.C. 1988 ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs").

Congress adopted that proviso to protect the United States from monetary liability—not to preclude only a particular time or method of assessment.

The Idaho Supreme Court also suggested that Idaho's filing fees are not "actually 'costs' incurred by a party litigant," because the Director of the Department of Water Resources "is really a disinterested party" whose role in the adjudication "is analogous to the 'stakeholder' in an interpleader action." Pet. App. 15a. That supposed distinction is of no moment. Nothing in the costs proviso or the concept of "costs" warrants different treatment for "interested" and "disinterested" parties.[14] In any event,

[14] For example, if the Idaho court had appointed a "disinterested" special master (see note 15, *infra*), his compensation and expenses might be taxed against a private party as "costs." See *Newton* v. *Consolidated Gas Co.*, 259 U.S. 101, 103, 106 (1922) (compensation of special master taxed as costs); *Ex parte Peterson*, 253 U.S. 300, 314-317 (1920) (auditor's fees taxed as costs). See also Fed. R. Civ. P. 53(a). Under the McCarran Amendment's costs proviso, however, those costs could not be taxed against the United States. Indeed, even outside of the McCarran Amendment, the United States has not waived its immunity from special master fees. See 28 U.S.C. 2412(a) (waiving the United States' immunity only to those costs enumerated in 28 U.S.C. 1920, which do not include special master fees). Exercising his authority to "supervise litigation," 28 U.S.C. 519, the Attorney General may agree to the appointment and compensation of a special master, but he is under no duty to do so and may refuse to pay the costs of a master appointed over his objection. If a federal court appoints a master over the government's objection, the master's expenses would then be paid through the judiciary's appropriations. See 52 Comp. Gen. 621, 623 (1973) (independent experts appointed by the court to assist the court's deliberations may be paid through the appropriations for the judiciary); accord 48 Comp. Gen. 681, 684 (1969); 39 Comp. Gen. 133, 137 (1959).

the Director is acting not as a distinterested "stakeholder" or factfinder for the court, but rather as a litigant who has sued the United States (as permitted by the McCarran Amendment) and who has interests adverse to those of the United States and the Indian Tribes that the federal government represents. See Amici Br. for the Nez Perce Tribe *et al.*

The Idaho Code manifestly assigns the Director an adversarial role in the litigation. It expressly defines the Director as a *party* to the suit. Idaho Code § 42-1401A(7) (1990). The Code then instructs the Director to receive the United States' claims and file a report describing them, Idaho Code §§ 42-1409 to 42-1411 (1990), but it expressly denominates those claims, the Director's report, any objections, and the Director's responses thereto as "pleadings." Idaho Code § 42-1412(4) (1990). Thus, the recommendations to be contained in the Director's report will be titled "proposed findings of fact." Tr. 611. Indeed, the Director initiated this adjudication, joining the United States as a "defendant," as required by the McCarran Amendment for joinder of the United States in the suit. Pet. App. 5a; see Idaho Code §§ 42-1406, 42-1406A (1990). And if the Director disagrees with the United States' water right claims, he may contest them, and if unsuccessful, he may appeal the district court's judgment. Idaho Code §§ 42-1412, 42-1418 (1990).[15]

[15] The Idaho Code separately provides for appointment of a special master to assist the court "to determine the water right claims asserted in the general adjudication." Idaho Code § 42-1422 (1990). The Idaho Supreme Court has specifically ruled that the Director cannot act as a special master in light of his participation as a party in the litigation. See

The Idaho Supreme Court's suggestion (Pet. App. 14a-15a, 15a-16a) that the United States benefits from the Director's activities ignores the realities of this litigation. The United States did not make its appearance in this suit as " 'a water applicant' or claimant seeking affirmative relief from the state." *Id.* at 16a. It has not voluntarily "entered the suit asking that its rights be determined." *Ibid.* The United States is an involuntary defendant that must participate in the adjudication to avoid losing its water rights. The true beneficiaries of this suit are the State of Idaho and the Idaho Power Company, who arranged for this litigation in the course of settling their prior lawsuit. As Justice Johnson aptly stated, "[t]he long and short of it is that the Idaho Power Company and the State of Idaho set the SRBA [Snake River Basin Adjudication] in motion. The United States is just along for the ride, pursuant to the McCarran Amendment." Pet. App. 28a (Johnson, J., dissenting).

Contrary to the Idaho Supreme Court's suggestion, the Director provides no special "services" to the United States. The Director's statutory responsibilities—such as serving process and collecting claims (see pp. 6-7, *supra*)—are simply obligations that the Director ought to assume as the initiator of this lawsuit. For example, a party's expenses in service of process are a classic example of litigation "costs." See, *e.g.*, 28 U.S.C. 1920, 1921 (fees for service by United States marshals may be taxed as

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Avondale Irrig. Dist. v. *North Idaho Properties, Inc.*, 523 P.2d 818, 822 (1974). Cf. *United States* v. *Superior Court*, 697 P.2d 658, 671-674 (Ariz. 1985) (state water resource agency does not act as "an adjudicator of fact or law" in a general water right adjudication).

costs). Other services the Director purports to provide to Idaho citizens—such as assistance in drafting claims, see Tr. 1178-1179—are not specifically included among the Director's statutory responsibilities, *ibid.*, and are neither requested by nor of any benefit to the United States. Indeed, some of the "services" that the Director purports to provide, such as access to the State's computer database, are available only at *additional* cost to a claimant. Tr. 1184-1185.

Moreover, the Director will actually employ the filing fees paid by the United States to fund, among other things, challenges to the United States' water right claims. Idaho uses filing fees to pay attorney salaries and other adjudication costs, including the Director's expenses incurred in investigation of matters to be included in his report, preparation and defense of the report, conduct of discovery, preparation of legal exhibits, drafting of other pleadings, preparation of expert witnesses for trial, appearance of witnesses at trial, and numerous other litigation-related activities. See, *e.g.*, U.S. Exh. 3006, at 2-10, 51-55; R. 423-424; Tr. 376, 378-381, 384-385, 390-391, 396-398, 547-553, 595. The State has projected that it will charge $2.1 million in attorney salaries to the adjudication account. See Tr. 417, 545-546.[16]

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[16] Idaho's method of financing the State's costs of adjudicating water rights through fixed and variable filing fees at the outset of the adjudication actually allows the State to recover even more costs than were previously recoverable by way of a judgment for costs. Under the prior system, Idaho could utilize a judgment for costs to recover from private litigants the costs of filing, processing, investigating, and reporting on water right claims. See Idaho Code § 42-1401 (1948) (Idaho Exh. 247) (authorizing the court to "adjudge and determine the proportionate amount of such cost of examination and

As this Court has stated, sovereign immunity may not be avoided "by devising a new name for an old institution." *Library of Congress*, 478 U.S. at 321. That principle applies here. The McCarran Amendment's costs proviso prohibits a State from obtaining a judgment for costs against the United States, and Idaho's latest method for recovering its litigation expenses—assessment of filing fees—does not differ in any material respect from a judgment for costs. Idaho's filing fees accomplish the same cost-shifting function that the State previously accomplished through a judgment for costs. The filing fee mechanism simply moves the timing of that cost-shifting forward to the start of the litigation and enlarges the class of recoverable expenses. Thus, not only does the McCarran Amendment lack any express consent to Idaho's assessment of filing fees, but by the clear import of the costs proviso, the United States' immunity is affirmatively expressed.

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survey to be paid by each of the parties"). Idaho's filing fees allow the State to recoup an additional category of litigation expenses—including attorney salaries, costs of service of process, witness expenses, evidentiary development expenses, investigatory expenses, and certain judicial expenses—that were not recoverable through a judgment for costs.

CONCLUSION

The judgment of the Idaho Supreme Court should be reversed.

Respectfully submitted.

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